71-1324

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

No. 71 —

THE PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

UNITED STATES OF AMERICA ex rel., ROBERT J. RAYMOND,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONSE NOT PRINTED

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INDEX

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions	2
Statement of the Case	3
Reasons For Granting the Writ:	
A. Suppression Of Facts Has Not Previously Been Found By Reviewing Courts Faced With a Defendant Who Knew The Information Before Trial; The Decision Below Thus Conflicts With Existing Precedent in State and Federal Courts and Amounts to a Contradiction in Terms	7
B. The Decision Below Rests In Part Upon A Misinterpretation and Unwarranted Extension Of This Court's Holding in *Brady* v. *Maryland*	9
C. The Decision Below Creates a Right to "Effective" Counsel Unreasonably More Extensive Than That Recognized Heretofore	13
D. Even if the State Had Violated a Duty to Disclose the Test Results or if Defense Counsel was Negligent in not Obtaining the Report, Still Respondent Was Convicted Beyond a Reasonable Doubt and His Application Was Correctly Denied	14
Conclusion	15

Appendix A—Opinions of the United States Court of Appeals for the Seventh Circuit .....A. 1

Appendix B—Order of United States Court of Appeals Denying Rehearing .....A. 31

Appendix C—Order of United States Court of Appeals Denying Rehearing *En Banc* .....A. 32

TABLE OF CASES

Barbee v. *Warden, Maryland Penitentiary,* 331 F. 2d 842 (4th Cir. 1964) 10

Brady v. *Maryland,* 373 U.S. 83, 87-88 (1963) 8, 9, 10, 12

Duffin v. *Warden, Maryland Penitentiary,* 224 Md. 645, 167 A. 2d 601 (1961) 8

Gideon v. *Wainwright,* 372 U.S. 353 (1963) 13

Giles v. *State of Maryland,* 386 U.S. 66, 74 (1967) 11, 12

Harris v. *State,* 453 S.W. 2d 838, 839 (Tex. Ct. of Crim. App. 1970) 9

Hayes v. *Wainwright,* 302 F. Supp. 716 (N.D. Fla. 1969) 8

Napue v. *People of State of Illinois,* 360 U.S. 264, 269 (1959) 11

People v. *Fleming,* 50 Ill. 2d 141, 145, 277 N.E. 2d 872 (1971) 14

People v. *Hull,* 60 Ill. App. 2d 239, 208 N.E. 2d 662, 670 (1965) 12

People v. *Raymond,* 248 N.E. 2d 663 (Ill. Sup. Ct. 1969) 5

People v. *Rosenburg,* 59 Misc. 2d 1, 297 N.Y.S. 2d 860, 863 (1969) 8

People v. *Schultz*, 260 Ill. 35, 40, 102 N.E. 1045 (1913) 12

Scalf v. *Bennett*, 408 F. 2d 325, 328 (8th Cir. 1969), *cert. denied*, 396 U.S. 887 (1970) 14

Schneble v. *Florida*, —— U.S. ——, 10 Crim. L. Rptr. 3106 (No. 68-5009, Mar. 21, 1972) 15

United States ex rel. Thompson v. *Dye*, 221 F. 2d 763, 767 (3rd Cir. 1955) 8

IN THE

Supreme Court of the United States

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THE PEOPLE OF THE STATE OF ILLINOIS,

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vs.

UNITED STATES OF AMERICA ex rel., ROBERT J. RAYMOND,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, the People of the State of Illinois, Respondent-Appellee in the Court below, prays that a writ of certiorari issue to review the adverse judgment issued against the State by the United States Court of Appeals for the Seventh Circuit in this case on December 10, 1971.

OPINION BELOW

The opinions of the United States Court of Appeals, Seventh Circuit, are reported at ——F. 2d—— (7th Cir. 1971) (No. 71-1330), and are attached hereto as Appendix A. That Court's denial of rehearing and denial of rehearing *en banc* are attached hereto as Appendices B and C.

JURISDICTION

The three separate opinions of the United States Court of Appeals for the Seventh Circuit, two portions of which constituted the Court's judgment adverse to the People of the State of Illinois, were issued on December 10, 1971. The State's petitions for rehearing or rehearing *en banc* were denied on January 24, 1972.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Did the State violate respondent's right to effective assistance of counsel or right to due process at trial when it revealed to him personally the results of tests conducted on his clothing but did not later reveal these results to his attorney, who made no request for any such information?

2. If the State's failure to make a second disclosure of the test results to defense counsel did violate defendant's constitutional rights, did this violation amount only to harmless error?

CONSTITUTIONAL PROVISIONS INVOLVED

Sixth Amendment to the Constitution of the United States:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

Fourteenth Amendment to the Constitution of the United States:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

On November 16, 1961, Virgie Barger, a 58-year-old widow and grandmother, was robbed and raped at approximately 6:00 P.M. while walking along a sidewalk near 67th and Ridgeland Streets in the City of Chicago (Tr. 15-20). The first policeman arrived on the scene at about 6:10 P.M. and obtained a description of the assailant which was then relayed to the police radio dispatcher (Tr. 39-41). Respondent was arrested on a street in the same neighborhood only minutes after Mrs. Barger was attacked (Tr. 48). At an eight-man line-up held approximately two and one-half hours after the crime, Mrs. Barger identified respondent as the man who had raped and robbed her (Tr. 25, 68, 70). (The remaining details concerning respondent's arrest, showup before his victim, identification by her at the line-up and admissions to her and police are thoroughly summarized in the opinion of Judge Hastings, reprinted in Appendix A, pages A. 10-14, infra.)

After respondent was identified and charged with the rape and robbery of Mrs. Barger on November 16, detectives spoke to respondent about 9:30 P.M. requesting his sweater, pants and undershorts for a laboratory analysis (respondent's Affidavit to Illinois Supreme Court, page 1, mentioned at 42 Ill. 2d 567; Habeas Corpus Petition, 11a.) Respondent willingly surrendered the articles of clothing requested (H.C. Petition, 11a). During the 3 to 11 P.M. shift the next day, November 17, 1961, the station commander reported the results of the microanalysis tests by telling respondent, as he remembers it: "The results of the test on your clothing came back and proved negative, but this don't clear you." (respondent's Affidavit 2; H.C. Petition 11a.) No agency of the State initiated

any further communication with respondent or his counsel about the test results, and counsel apparently did not learn of the microanalysis report's existence until after respondent's trial was over and he stood convicted of rape and robbery (Tr. 194-195). Neither during his two interviews with his lawyer before trial nor at any time during his trial did respondent himself communicate his knowledge of the microanalysis test to defense counsel (Tr. 194). After his conviction by a jury on July 2, 1962, respondent learned from a fellow inmate in Cook County Jail how to obtain the results of the test on his clothing and its possible usefulness; he then wrote a letter to the Police Crime Laboratory and he so informed his lawyer and the trial court during hearing on a motion for new trial (H.C. Petition, 11a; Tr. 189, 193-94). At that hearing, the State introduced a Chicago Police Crime Laboratory report which stated that respondent's clothes had been examined by a microanalyst and that they contained "no spermatozoa and extracts" (Tr. 189-190). The trial judge denied the motion for a new trial and proceeded to sentence respondent to concurrent terms of 20 to 40 years in the Illinois State Penitentiary for rape and 15 to 20 years for robbery.

Respondent made a direct appeal of his conviction to the Illinois Appellate Court, First District, which affirmed the judgment on March 24, 1965. 57 Ill. App. 2d 292 (1965). Although he had neglected to argue the suppression of evidence point in the Appellate Court, respondent raised the issue in a detailed post-conviction petition filed on March 27, 1967, in the Circuit Court of Cook County. That court dismissed the petition and its ruling was appealed to the Supreme Court of Illinois, which considered the suppression issue in spite of the appellate waiver. After full analysis of the clothing test incident and its relevance

to respondent's case, the Supreme Court unanimously affirmed dismissal of his P.C. petition distinguishing *Brady* v. *Maryland* and holding that:

> ". . . where a defendant is fully informed as to matter possessed by the State which would not necessarily be exculpatory, and does not exhibit any interest in its procurement until after he has been found guilty, no deprivation of due process has been shown." *People* v. *Raymond*, 42 Ill. 2d 564, 568, 248 N.E. 2d 663 (1969).

On June 2, 1970, respondent filed a *pro se* petition for writ of habeas corpus in the United States District Court alleging several Constitutional errors in the criminal proceedings leading to his imprisonment, among them the issue which is the subject matter of the instant petition. After receiving a written response from the State, Judge Edwin A. Robson dismissed the habeas corpus application on October 6, 1970; he ruled that the pre-trial identification of Raymond had not been unduly suggestive or conducive to mistaken identity, and that the remaining alleged errors did not rise to constitutional stature.

The Court of Appeals for the Seventh Circuit granted a Certificate of Probable cause, Raymond's appeal was docketed and counsel was appointed to represent him. Appointed counsel argued for reversal of the District Court on two grounds, one of which was the prosecutor's alleged "breach of his duty to disclose to the Court and defense attorney evidence favorable to the accused", with a resulting violation of due process at trial. The State argued that there had been no suppression of the clothing test results according to the standard of *Brady* v. *Maryland*, since Raymond personally had been told the results in clear language the day after his arrest, and neither he nor his attorney had ever requested the information at

any later date. The specific question of whether the defendant had been deprived of his Sixth Amendment right to counsel by the defense lawyer's ignorance of the micro-analysis report was not briefed and argued by either side in the Court of Appeals, just as it had not been raised before the Illinois Supreme or Appellate Courts. On December 10, 1971, after lengthy deliberations, each member of the three-judge panel of the Court of Appeals issued a separate opinion, no two judges being able to reach exact agreement on the issues presented in this Petition. (See opinions reproduced at Appendix A, infra.) The majority of the Court agreed that Raymond's conviction had violated constitutional standards because of his counsel's factual ignorance, but Chief Judge Luther Swygert held that the *Brady* rule and the right to due process had been violated, while Judge Wilbur Pell based his decision on violation of the defendant's right to counsel. Senior Judge John S. Hastings dissented, expressing the opinion that the majority's decision would result in "a grave miscarriage of justice to society" and that the State had not suppressed evidence in violation of *Brady*.

REASONS FOR GRANTING THE WRIT

A.

Suppression Of Facts Has Not Previously Been Found By Reviewing Courts Faced With A Defendant Who Knew The Information Before Trial; The Decision Below Thus Conflicts With Existing Precedent In State And Federal Courts And Amounts To A Contradiction In Terms.

In the present case, respondent candidly admitted that he willingly gave his clothing to police for examination and that the station commander reported back to him the very next day that the test was "negative, but this don't clear you" (Tr. 196, H. C. Petition 11a, page A. 21 infra.). There can be no doubt that this report of "negative" results was understood by respondent, a man of average intelligence judging from his petition in the district court. He had himself already noticed on the night of the crime that a police sergeant could see no obvious signs of spermatozoa on his undershorts (Tr. 194); this observation *was communicated* to defense counsel *before trial,* even if the result of the microanalysis report was not mentioned by respondent to his lawyer (Tr. 194). However, the official Chicago Crime Laboratory report did not actually come out in court until respondent, on the advice of fellow inmates, wrote for a copy of it and it was produced at the post-trial hearing before sentencing (Tr. 190-197).

Petitioner submits that it is both illogical and contrary to precedent to find suppression of evidence by the prosecution when the respondent knew about the information long before trial, and his counsel knew that, at least with

the naked eye, police looked for and could not find spermatozoa on his undershorts. In *United States ex rel. Thompson* v. *Dye,* 221 F. 2d 763 (3rd Cir. 1955), a decision which this Court explicitly approved in the course of its *Brady* opinion, the court found that favorable evidence had been suppressed there; however, it stated the principle that "evidence is not suppressed or withheld if the accused has knowledge of the facts and circumsances or if they oherwise become available to him during trial". 221 F. 2d at 767. More directly to he point, the court in *Hayes* v. *Wainwright,* 302 F. Supp. 716 (N.D. Fla. 1969) found no suppression of evidence where the prosecutor did not bring out information of self-defense conveyed to the sheriff by the defendant at the time of his arrest—the court saw clearly that these facts were known to the defendant and within easy reach of his lawyer. The principles enunciated by the above federal courts conflict with the majority's decision in the present case.

Besides the holding of the Illinois Supreme Court here, two other decisions of state reviewing courts in cases almost identical to the present one have found *no suppression* of evidence where defendants knew about the information which they claimed was suppressed. The murder defendant in *People* v. *Rosenburg,* 59 Misc. 2d 1, 297 N.Y.S. 2d 860, 863 (1969), had known about the results of certain tests but failed to communicate them to his attorney. An assault and battery defendant in *Duffin* v. *Warden, Maryland Penitentiary,* 224 Md. 645, 167 A. 2d 601 (1961), had known that the police had taken a knife from a prosecution witness and that this weapon was never introduced into evidence. These two state high court decisions conflict directly with the holding of the court below that dis-

closure does not occur until the state informs the defense lawyer, regardless of whether the defendant himself was informed. In these cases just as in the present one, there had been no prosecution effort to evade defense counsel by disclosing information to an ignorant defendant who would promptly forget about it. Another state decision conflicting in principle with the ruling below is *Harris* v. *State*, 453 S. W. 2d 838, 839 (Tex. Ct. of Crim. App. 1970).

As dissenting Judge John Hastings said below, "no case has been cited since *Brady*, and we know of none, wherein a court has found that evidence has been suppressed in violation of *Brady* when either the defendant or his attorney had knowledge of the evidence". (Page A. 20, infra.).

B.

The Decision Below Rests In Part Upon A Misinterpretation And Unwarranted Extension Of This Court's Holding in Brady v. Maryland.

The majority of the Court of Appeals for the Seventh Circuit decided in the present case that, although neither respondent nor his lawyer requested the microanalysis report on his clothing before or during trial, the prosecution could be charged with suppressing the report and depriving respondent of due process since it might have been material to the outcome. Petitioner submits that, in so deciding, the court below apparently ignored the language of this Court's holding in *Brady* v. *Maryland*, 373 U. S. 83. In that case defense counsel had asked to examine a co-defendant's extrajudicial statements and the prosecutor withheld one of them which could have affect-

ed the jury's recommendation of punishment for his client. This Court affirmed a decree ordering a new trial for the defendant on the question of punishment, holding "that suppression by the prosecution of evidence favorable to an accused *upon request* violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution . . . A prosecution that withholds evidence *on demand* of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not 'the result of guile', to use the words of the Court of Appeals". (citation omitted (emphasis added) 373 U. S. at 87-88.

The holding in *Brady* clearly envisions the occurrence of some event to trigger the prosecutor's obligation to disclose evidence to the defense. In that case it was a direct request from the defendant's lawyer which engendered the requirement that the state turn over all the co-defendant's statements. In cases decided since *Brady*, as the court below correctly noted, federal courts have held that other occurrences besides a request may force disclosure of favorable state's evidence. For example, the misleading trial use by the prosecution of a pistol not definitely linked to the crime created an obligation for the state to supply a copy of the favorable ballistics report to the defense, even in the absence of a request, according to the court in *Barbee* v. *Warden, Maryland Pentientiary*, 331 F. 2d 842 (4th Cir. 1964).

An earlier decision by this Court defined another situation where events at trial would trigger the state's duty

to disclose information; in *Napue* v. *People of the State of Illinois,* 360 U. S. 264 (1959), it was held that a conviction must fall under the Fourteenth Amendment when the prosecution "although not soliciting false evidence, allows it to go uncorrected when it appears". 360 U. S. at 269. In *Giles* v. *State of Maryland,* 386 U. S. 66 (1967), a case decided under *Napue,* this Court considered a rape case somewhat similar to the present one in that it contained charges of suppression of evidence by the prosecutor. In *Giles* not only facts about the prosecutrix's mental state and sexual habits had been withheld, but also conflicting statements in police reports by the prosecutrix and a male witness had never been divulged. This Court remanded the "terribly troublesome" case to the state reviewing court for a determination of whether a new trial should be granted under the standard of *Napue.* Although recognizing that the case also presented the broader question of "whether the prosecution's constitutional duty to disclose extends to all evidence admissible and useful to the defense", the plurality of this Court found it unnecessary to answer the question and therefore refrained from doing so. 386 U. S. at 74.

However, the present case, in contrast to all those cited above, included no triggering event which would create a responsibility of the state's attorney to disclose the microanalysis report to respondent's counsel before or during trial. No request was made by the defense to see any test results before a verdict was reached, no misleading or false evidence about the act of raping Mrs. Barger was offered or discussed by the state and no reference, direct or indirect, was made to the condition of respondent's undershorts. Neither can it be said that the failure to find spermatozoa on the respondent's shorts would necessitate a verdict of not guilty on the rape charge, since only

slight penetration need be proved under Illinois law to sustain a rape conviction. *People* v. *Hull,* 60 Ill. App. 2d 239, 208 N. E. 2nd 662, 670 (1965); *People* v. *Schultz,* 260 Ill. 35, 40, 102 N. E. 1045 (1913).

Thus, the decision of the court below to burden the prosecutor with disclosure of non-exculpatory evidence, even in the absence of misleading actions or duplicity on his part and *without* first placing *any responsibility* on defendant or his lawyer to make any inquiry, is an unwarranted extension of this Court's *Brady* ruling. The extension of *Brady* accomplishes exactly what this Court refused to do in *Giles.* The majority decision places a heavy and ambiguous constitutional responsibility for disclosure on state prosecutors which they cannot be certain of fulfilling until they have shown their entire file to defense counsel regardless of what he requests. Such an extreme rule could endanger the efficient administration of justice in all states which comprise the Seventh Circuit.

So broad a ruling is certainly not necessary to prevent an "unfair trial" of the accused. The *Brady* rule and its interpretation in *Barbee* are sufficient to protect a defendant from the prosecutor's reneging on disclosure requests, misleading a jury or wilfully suppressing exculpatory evidence, none of which can be said to have occurred in the present case. No judge reviewing this case has yet directly stated that respondent had an unfair trial —a characterization which would be quite implausible in the face of the record.

C.

The Decision Below Creates A Right To "Effective" Counsel Unreasonably More Extensive Than That Recognized Heretofore.

The question of whether the disclosure required by the Court below was needed to guarantee respondent the effective assistance of counsel is a more difficult one and one which *was never briefed and argued before any court* which has heard this case to date. Nevertheless, the decision of Judge Pell to become the second member of the majority below was based on his belief that disclosure of the test results was necessary for effective assistance of counsel.

Petitioner recognizes the need for defense lawyers to be present at crucial points in the criminal proceedings (eg. *Gideon* v. *Wainwright,* 372 U. S. 353), and to be sufficiently knowledgeable about a case in order to perform competently for their clients. But petitioner submits that it is opening a pandora's box to hold that the prosecution is responsible for informing a defense lawyer about all of the facts in his case, regardless of what efforts he himself makes, so that he is able to best assist his client. Under the ruling by the court below containing these implications, might not the State become chargeable with *all* or almost all of the deficiencies which plague any but the most competent defense counsel? It seems that this may be suggested by the opinion of Judge Pell; he speaks of *suppression* by the prosecution, but points with emphasis to the *two* interviews of respondent by his trial lawyer in *eight* months of incarceration (Page A. 22). Yet when questions of incompetency of retained counsel have arisen directly, the courts have refused to hold that all errors in judgment or deficiencies in diligence by defense

counsel amount to constitutional violations. See eg.: *People* v. *Fleming,* 50 Ill. 2d 141, 145, 277 N.E. 2d 872 (1971); *Scalf* v. *Bennett,* 408 F. 2d 325, 328 (8th Cir. 1969), *cert. denied,* 396 U. S. 887 (1970). In the present case where defense counsel's lack of diligence may have caused his ignorance of the test results, it is inconsistent and illogical to charge his deficiency to the prosecutor and find grounds for voiding the conviction, when the same facts presented as an incompetency argument would not warrant granting of relief.

D.

Even If The State Had Violated A Duty To Disclose The Test Results Or If Defense Counsel Was Negligent In Not Obtaining The Report, Still Respondent Was Convicted Beyond A Reasonable Doubt And His Application Was Correctly Denied.

The record shows that respondent was arrested only blocks from where Mrs. Barger was raped and robbed, only minutes after the crime occurred, wearing the clothes she described. He was positively identified by Mrs. Barger at trial since she had confronted him face to face under a street light and in a passageway for several minutes. Respondent, according to several witnesses, made incriminating statements to Mrs. Barger after he was in police custody (See summary of facts in Opinion of Judge Hastings, pp. A. 10-A14). These and other facts brought out at trial indicate respondent's guilt beyond a reasonable doubt, guilt which is not contradicted by the clothing test results (see Illinois cases cited at page 12, supra). The state trial judge, after seeing the laboratory report at a post trial hearing, decided that it would not upset the jury's verdict (Tr. 197). Indeed, a majority of the court

below stated a belief in respondent's guilt, dissenting Judge Hastings saying that society was about to suffer a miscarriage of justice (p. A. 10) and Judge Pell voting for reversal "somewhat reluctantly in view of the clear exposition in Judge Hastings' opinion of the facts showing Raymond's guilt . . ." (p. A. 20). And yet Judge Pell voted to issue the Great Writ in spite of his opinion of respondent's guilt.

Petitioner submits that, according to this Court's decisions on harmless error, any violation of respondent's rights caused by his counsel's ignorance of the micro-analysis report must have been harmless beyond a reasonable doubt. Therefore, the court below was incorrect and the District Court's dismissal of respondent's application should have been affirmed to prevent a miscarriage of justice to society. *Schneble* v. *Florida,* No. 68-5009 (U.S. Supreme Ct., Mar. 21, 1972), 10 Crim. L. Rptr. 3106.

CONCLUSION

For the foregoing reasons, petitioner submits that this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

OPINION OF THE

UNITED STATES COURT OF APPEALS

SEPTEMBER TERM, 1971 — SEPTEMBER SESSION, 1971

No. 71-1330

UNITED STATES OF AMERICA ex rel. ROBERT J. RAYMOND,
Petitioner-Appellant,

v.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent-Appellee.

Appeal from the United States District Coourt for the Northern District of Illinois, Eastern Division
No. 70 C 1322
EDWIN A. ROBSON,
Judge.

DECEMBER 10, 1971

Before SWYGERT, *Chief Judge,* HASTINGS, *Senior Circuit Judge,* and PELL, *Circuit Judge.*

SWYGERT, *Chief Judge.* This is an appeal from the denial of appellant's petition for a writ of habeas corpus. Appellant, Robert J. Raymond, is imprisoned at the Illinois State Penitentiary pursuant to a conviction for rape and robbery. On July 26, 1962 the Circuit Court of Cook County sentenced him to concurrent terms of 20 to 40 years for rape and 15 to 20 years for robbery. The Illinois Appellate Court affirmed these convictions on March 24, 1965, *People* v. *Raymond,* 57 Ill. App. 2d. 292, 206 N. E. 2d 740 (1965). Post-conviction relief was denied by the

Circuit Court of Cook County on June 8, 1967 and that denial was upheld by the Supreme Court of Illinois on June 20, 1969, *People* v. *Raymond,* 42 Ill. 2d 564, 248 N. E. 2d 663 (1969).

Appellant filed a petition for a writ of habeas corpus on June 2, 1970 challenging the constitutionality of his conviction on two grounds: Raymond claims that he was denied due process of law by the state's use of identification procedures that were unnecessarily suggestive and conducive to irreparable mistaken identification and by the state's failure to disclose to the defense attorney material evidence favorable to the accused. The judgment of conviction is reversed. As to Raymond's second argument, Judge Pell and I agree that the nondisclosure of the result of the laboratory test to counsel for defendant requires reversal. However, I alone agree with Raymond's argument that the particular identification procedures used here constitute an alternative ground for reversal of the conviction.

The crime for which Raymond was convicted was alleged to have occurred at 6:00 p. m. on November 16, 1961. Mrs. Virgie Barger, a white woman, 58 years old at the time, was walking down the street when a young, Negro man grabbed her, took three dollars from her purse and after dragging her into a nearby gangway, raped her. Apart from the victim and her attacker, there were no witnesses to the incident.

Police Officer Mallder arrived at 6:10 and escorted Mrs. Barger to her apartment three blocks away. Mrs. Barger gave the officer a description of her attacker which he sent to the Central Communications room after 6:15.

Between 6:10 and 6:15 Raymond was arrested for an unrelated crime approximately five blocks from the scene of the rape. En route to the station house, the arresting officer heard the description of Mrs. Barger's assailant over the police radio and immediately brought Raymond to Mrs. Barger's apartment. Raymond, in handcuffs and accompanied by six uniformed policemen, confronted Mrs. Barger twice between 6:20 and 6:30. Mrs. Barger did not identify him at this time. Between 8:00 and 8:30 at the station house later that evening, Raymond, wearing the same clothes he wore when arrested, took part in a lineup of eight men. At this point, Mrs. Barger identified him as her assailant. The defendant points to these procedures —two "showups"[1] immediately after the alleged crime followed two hours later by a lineup—as constituting a violation of due process.

Defendant's second claim refers to a police laboratory test for spermatozoa made on Raymond's sweater, pants and undershorts at 9:30 p. m. the evening of his arrest. On the following day the police station commander reported the results to Raymond saying, "The results of the test on your clothing came back and proved negative but that don't clear you". Raymond's attorney did not hear of this report until after his client had been found guilty. The state introduced the report only at the sentencing hearing following the trial.

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1. A showup can be described as a "single suspect (confrontation) wherein a witness is presented with one individual and asked if he can make an identificaton". *United States* v. *Clark,* 294 F. Supp. 44, 49 (D. D. C. 1968).

I

The standard to be applied in judging a due process claim involving pretrial identification procedures derives from *Stovall* v. *Denno*, 338 U.S. 293 (1967). While the Court in *Stovall* refused to give retroactive application to the rule announced in *United States* v. *Wade*, 388 U.S. 218 (1967), and *Gilbert* v. *California*, 388 U.S. 263 (1967), requiring counsel at pretrial identification confrontations, it did present as an alternative ground of attack the claim that the identification procedures were "so unnecessarily suggestive and conducive to irreparable mistaken identification that (the defendant) was denied due process of law". 388 U.S. at 302. Defendant claims that the identification procedures used here fall under this standard either because of the holding of a showup immediately after the crime or because of the combined use of two showups and a lineup within two hours of each other.

The showup in the instant case can be supported under *Stovall*. In *Stovall*, the Court held that while "the practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned", any particular claimed violation of due process must depend on the "totality of circumstances surrounding it". 388 U.S. at 302. The circumstances considered there pointed to the necessity for the showup where formal lineup procedures would have been impractical: Since the only witness was in the hospital in imminent danger of dying, a direct confrontation between the witness and her alleged assailant was the only "feasible" procedure. Showups have been sustained in other situations when the state's interest in an expeditious identification could be shown, as in *Simmons* v. *United*

States, 390 U.S. 377 (1967), where the defendant's photo was presented to witnesses the day after a serious felony had been committed when the memory of the incident was still fresh and while the perpetrators remained at large, or in *Bates* v. *United States,* 405 F. 2d 1104 (D.C. Cir. 1968), where the defendant was apprehended shortly after the crime and returned to the scene of the crime to confront the complaining witnesses. *See Wise* v. *United States,* 383 F. 2d 206 (D.C. Cir. 1967), *cert. denied,* 390 U.S. 964 (1968); *Harris* v. *Dees,* 421 F. 2d 1079 (5th Cir. 1970); *cf. United States* v. *Gilmore,* 398 F. 2d 679 (7th Cir. 1968). In the instant case, where there were two reports of attacks in the same five block area, within fifteen minutes of each other, the police sought to determine quickly if they had apprehended the right man, and an immediate showup twenty minutes after the crime, rather than a formal lineup, was justified.

But this determination is not dispositive since the showup alone did not yield an identification of Raymond as Mrs. Barger's assailant; it is the combination of procedures—two showups and a lineup—that finally resulted in a positive identification. However justified a single showup or a single lineup is at the outset, the rationale of *Stovall* suggests that they are alternative procedures. Their use in combination is highly suspect. In *Foster* v. *California,* 394 U.S. 440 (1968), the complaining witness observed a police station lineup involving three men—the defendant, who was approximately six feet tall, and two very much shorter men. The witness could not identify the defendant at this time and instead asked to speak to him. A one-to-one confrontation was immediately arranged, but the witness remained uncertain. About a week later, at a second lineup in which the defendant was the

only person who had also appeared in the first, the witness was "convinced" that the defendant was the robber. The Court found that the pretrial identification evidence was inadmissible on the ground that "the pretrial confrontations clearly were so arranged as to make the resulting identifications virtually inevitable". 394 U. S. at 443.

The facts of the instant case fit even more squarely under the ruling of Foster. The identification procedures began with a one-to-one showup which, as *Stovall* states, is itself a highly suggestive procedure. 388 U. S. at 302. The defendant, handcuffed and accompanied by six uniformed policemen, confronted Mrs. Barger at her apartment twenty minutes after the alleged crime, wearing the same leather jacket and brim hat that had fit the description she had given of her assailant. The witness did not identify him at this time, nor did she ask to see him again as the complaining witness in *Foster* had. The lineup held only two hours later at the police station was solely at the police's initiation. Furthermore, there is some dispute as to whether Raymond was the only man in the lineup wearing a leather jacket and brim hat. It is clear that he was wearing the very same clothes he had worn at the confrontation with the plaintiff a short time before, and that he was the only member of the lineup to have participated in a prior showup. I believe that these procedures "so undermined the reliability of the eyewitness identification as to violate due process".[2]

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2. Several cases have upheld showup-lineup combinations where the initial encounter was justified under *Stovall* and yielded an identification of the suspect at the outset. *E.g., United States* v. *DeLeo,* 422 F. 2d 487 (1st Cir. 1970); *United States ex rel. Garcia* v. *Follette,* 417 F. 2d 709 (2d Cir. 1969).

Foster v. *California*, *supra* at 443.

The instant case can be compared to cases attacking the conduct of lineups when police officers have in some way drawn attention to the suspect during the lineup. *E.g.*, *United States ex rel. Stevenson* v. *Mancusi*, 409 F. 2d 801 (2d Cir. 1969).[3] In *Wade* for example, several witnesses testified that they saw the suspect through an open door outside the courtroom before he was joined by other prisoners and before the lineup formally began. Indeed, the finding in *Wade* that lineups require the presence of a lawyer was based in part on the conclusion that lawyers could help prevent those practices whose net effect was to turn a lineup into a showup. 388 U. S. at 236. In this case, practices similar to those which the *Wade* rule is henceforth to deter did occur. Where the

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In this case, Mrs. Barger did not identify Raymond at the initial showup and thus the danger of suggestion resulting from subsequent encounters with the defendant was exacerbated.

3. In *United States* v. *Wade*, *supra* at 235, the Court reviewed several state court decisions describing the numerous ways in which police single out their suspect during lineups, for example, where "all in the lineup but the suspect were known to the identifying witness . . . the other participants in a lineup were grossly dissimilar in appearance to the suspect . . . only the suspect was required to wear distinctive clothing which the culprit allegedly wore . . . the witness is told by the police that they have caught the culprit after which the defendant is brought before the witness alone or is viewed in jail . . . the suspect is pointed out before or during a lineup and . . . the participants in the lineup are asked to try on an article of clothing which fits only the suspect".

showup was held only two hours before the lineup, the lineup can hardly be seen as a fair or objective proceeding.

Nor can I find, in considering the "totality of circumstances" surrounding this case, any showing of state necessity that may justify holding a lineup immediately after a showup. The state stresses the fact that Mrs. Barger was hysterical at the showup. It appears to be claiming either that since her first encounter with the defendant was inconclusive, police efficiency required a second, or that the procedures were not prejudicial since Mrs. Barger's condition in some way eradicated all memory of the previous confrontation. It is not at all clear that Mrs. Barger was hysterical: She was sufficiently in control to give the police a detailed description of her assailant. She was sufficiently in control so that the police officers thought a showup could be immediately fruitful to determine if their investigation was on the right track. Moreover, unlike the justification offered for a showup immediately following commission of a crime, there is no legitimate state interest in securing a positive identification that can be held to override the prejudice of these procedures. In *Palmer* v. *Peyton,* 359 F. 2d 199, 202 (4th Cir. 1966), which is cited approvingly in *Stovall,* the court holds that the state may not "rely on an identification secured by a process in which the search for truth is made secondary to the quest for a conviction".

I hold that the conduct of the pretrial identification procedure violated appellant's constitutional rights and that the resultant evidence was inadmissible at trial. Moreover, the state did not offer sufficient independent corroborative evidence to justify admitting Mrs. Barger's in-court identification of Raymond. *E.g., Wright* v. *United*

States, 419 F. 2d 1256, 1261 (D. C. Cir. 1968); *Frazier* v. *United States,* 419 F. 2d 1161 (D. C. Cir. 1969). The incident in question took place at dusk. Mrs. Barger was a 58-year-old woman who had been surprised by her attacker and dragged on her back into the nearby gangway. Where the witness' powers of observation are in doubt to that extent, it cannot be said that the in-court identification "had a source sufficiently independent of the (pretrial identifications) to be free from (their) taint". *Frazier* v. *United States supra* at 1170.

II

Defendant's second claim relates to the state's failure to disclose the results of a laboratory test on defendant's clothing to the defense attorney. At oral argument, the state conceded a duty to disclose this information, but contended that the duty was wholly fulfilled by disclosure to the defendant rather than to the defense counsel.

This is a case of first impression. Cases dealing with the state's duty of disclosure consider the scope of disclosure—the kinds of information that must be disclosed and the circumstances triggering that duty—and not the party to whom the information is to be given.[4] In each

4. The case of *United States ex rel. Thompson* v. *Dye,* 221 F. 2d 763 (3d Cir. 1955), upon which the state principally relies, involves the scope of the prosecution's duty of disclosure only. The state quotes the principle reaffirmed in *Dye* that "(e)vidence is not suppressed or withheld if the accused has knowledge of the facts and circumstances or if they otherwise become available to him during trial". 221 F. 2d at 767. That principle refers to the court's concern that disclosure be used to equalize the resources of the defense counsel and the prosecutor, and thus that the defense attorney be given access only

case, the contours of the state's responsibility to disclose are determined by considering what the defense counsel needs to know in order to insure a fair trial. The test of what evidence has to be revealed is such that the only reasonable recipient of that information is the defense attorney. *Brady* v. *Maryland,* 373 U.S. 83 (1962) held that the prosecution's nondisclosure of evidence violated due process where that evidence is "material either to guilt or to punishment". The court's rationale was stated simply: "Society wins not only when the guilty are convicted but when *criminal trials* are fair . . ." 373 U.S. at 87 (emphasis added). *Barbee* v. *Maryland,* 331 F. 2d 842 (4th Cir. 1964), extended the *Brady* rule, holding that the state's duty was not dependent on the diligence of counsel in requesting the evidence in question: "In gauging the nondisclosure in terms of due process, the focus must be on the essential fairness of the procedure

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to information that would be beyond his competence to obtain in the ordinary course of criminal discovery. Where the information at issue consisted of statements made by one of the arresting officers to the prosecutor, the court concluded that "(h)ad the defense trial lawyer been without peer as an advocate he still could hardly have been held to putting the second arresting officer on the stand where there was every reasonable expectation that his story would dovetail with what (the other arresting officer) had said". 221 F. 2d at 768. In *Hayes* v. *Wainwright,* 302 F. Supp. 716 (1969), the court found no due process violation since the undisclosed information involved "evidence" of self defense that had been related to the sheriff by the defendant and was clearly within the attorney's competence to discover. In the instant case, the results of police laboratory tests are conceded to fall within the scope of the prosecution's duty of disclosure; the remaining question is whether that duty was discharged by disclosure to the defendant.

and not on the astuteness of *either counsel*". 331 F. 2d at 843 (emphasis added).[5]

If there is a duty to disclose in the instant case—as the state admits—it can only be grounded in the importance of the evidence to the defense's case at trial. To then maintain that the state's duty is fulfilled before that information is squarely in the hands of the defense counsel is wholly inconsistent.

The state's argument implies either an additional burden on the attorney to ask the defendant for any information which the state may or may not have disclosed, or alternatively, on the defendant himself to disclose that information to his attorney. We can find no support for either contention. The state's duty to disclose which is not to be conditioned on the defense attorney's request for information from the prosecution, *Barbee* v. *Maryland, supra, Levin* v. *Katzenbach,* 363 F. 2d 287 (D.C. Cir. 1966), cannot now give rise to a new burden on defense counsel to specifically request that information from the defendant.

The state principally emphasizes the defendant's choice in withholding this information or in furnishing it to his attorney.[6] Where the items involved are material to an

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5. *Levin* v. *Katzenbach,* 363 F. 2d 287 (1966), extends the prosecution's duty of disclosure even beyond that defined in *Barbee* v. *Maryland, supra,* to include evidence that was discoverable through due diligence on the part of defense counsel. 363 F. 2d 287 (1966). See *Giles* v. *Maryland,* 386 U.S. 66, 100 (1966) (concurring opinion).

6. The state emphasizes the use of the word "accused" in *United States* v. *Dye, supra* at 767, where the court refers to evidence that the "accused has knowledge

accused's defense at trial, and are, as in this case, technical data uniquely in the possession of the police, there can be no informed choice on the part of the defendant. The state's argument implies that fulfillment of the duty to disclose, which was triggered by the significance of the state's information to the defendant's case whether or not specifically requested by "astute" counsel, would rely finally on the "astuteness" of the defendant in using the information to its best advantage.

We cannot agree that the state's duty to disclose evidence, as required by due process, can be discharged by disclosure to the defendant rather than to the defense counsel.

The district court's denial of defendant's petition is reversed and the cause is remanded to the district court for further proceedings.

HASTINGS, *Senior Circuit Judge,* dissenting.

Because of my serious concern with the result reached by the majority in this case, I have made a meticulous study of the transcript of the evidence in this case as it was tried to a jury in the Criminal Court of Cook County,

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of", or of the word "petitioner" in *Hayes* v. *Wainwright, supra* at 718, where the court speaks of "evidence within the petitioner's knowledge and thus available for his defense". Depending upon the context, those words can function simply as terms of art signifying either the accused individually or counsel for the accused. The clear implication in the above case is "counsel for the accused". See note 4. Similarly in *Brady* v. *Maryland, supra* at 87, where the evidence at issue had been specifically requested by the defense counsel, the court speaks of the withholding of evidence "on demand of an accused".

Illinois, beginning June 26, 1962 and concluding July 2, 1962 with a jury verdict finding defendant Robert Raymond guilty of robbery and guilty of rape. After this study of the record and the evidence in the Illinois state court proceeding, I am convinced that the conclusions reached by the majority will result in a grave miscarriage of justice to society. My conclusions require a more comprehensive statement of the facts than is apparent from the majority opinion.

I

The prosecuting witness, Virgie Barger, age 58, at the time of the alleged robbery and rape on November 16, 1961, resided in an upstairs apartment at 1753 E. 67th Street, Chicago, Illinois. She had been a widow for nine years, was the mother of three children and the grandmother of six grandchildren. She had worked at her usual place of employment from 8:00 a. m. to 4:10 p. m. that day. Leaving work she walked to a grocery store about five blocks from her residence where she did some shopping and left there about 5:40 p. m. She was walking north on the sidewalk on the east side of Ridgeland Street between 67th and 68th Streets on her way home. She reached a point about one block from her home around 6:00 p. m. It was dusk, the street lights were lighted and the nearest street light was about ten feet from the point of the alleged crime.

A this point, the assailant, later determined to be the petitioner, Robert Raymond,[1] was walking south on the

1. Robert Raymond was referred to as the defendant in the state court trial proceedings and as petitioner in various post-trial proceedings. He is variously referred to as petitioner, appellant, petitioner-appellant and defendant in his federal habeas proceedings. For the sake of simple clarity I shall refer to him here as petitioner.

same sidewalk approaching her. As they met face-to-face he placed his gloved hand over her mouth so she could not scream and pulled her down onto the sidewalk. He then pulled up her skirt and slip and searched her for a money belt. Finding none, while she was lying there he searched her purse and removed three $1.00 bills and about $1.00 in change, a total of about $4.00 and asked her, "Are you sure that's all the money you've got"? She replied that was all she had.

While this occurrence took place, *from the street light ten feet away she had a close clear view of his face.* She saw no one else on the street at this time.

He then dragged her from the sidewalk into a gangway, paved with cement, to a point where it was quite light from either a window or a back porch light. While she was there lying down he tore off her panties and began to rape her, asking "weren't you ever raped before"? She answered in the negative. She thought the sexual act lasted about three minutes and said that during that period of time *"it was quite light"* and *"I could see good". In answer to the question, "And could you see his face during the three minutes or so when he was raping you"?,* she responded: *"Yes, yes, yes".* (Emphasis added).

When the act of rape was concluded he said to her, "If you won't scream I won't hurt you". With that he left her lying there, her back hurting and her face bruised. She had difficulty getting up from the cement pavement, but finally did arise and starting walking to her home a few doors away. She met two ladies and a man she had previously seen in the neighborhood, told them what had happened to her and asked them to help her home. One of the assisting ladies hailed a passing police car which stopped and Officer Mallder came to her. Mrs. Barger

told him what had happened and asked him to help her upstairs. The other three people left without their names being obtained.

She described her assailant to Officer Mallder as being colored, about 20 years of age, about 5 feet 10 inches in height, wearing a leather finger-tip jacket, a narrow brim hat and dark trousers. Officer Mallder assisted her to her upstairs apartment and after receiving her report of the occurrence and description of the assailant, he returned to his squad car and called in his report to the Central Communications Room. He then returned to her apartment and began making out his report.

In the meantime, Officer Forberg was cruising alone in a squad car at 67th & Stony Island and received over his car radio a report of a robbery and rape with a description of the assailant (as previously given). While traveling west on 68th Street about 6:10 p. m. he saw a man answering this description run out of an alley. The officer got out of his car and chased the running man. After two commands, the man stopped and asked "What's wrong, Officer"? He was handcuffed and started a commotion and was put into the squad car. This was about five blocks from the point where Mrs. Barger was raped. Other officers arrived to help Officer Forberg. While en route to the 10th District Station they heard the radio description of the assailant and detoured to the home of the victim.

Two police officers and a police sergeant entered Mrs. Barger's apartment with petitioner. Petitioner was there with the officers about ten minutes. During that time petitioner said nothing to Mrs. Barger and she said nothing to him. Officer Mallder said she was "very hysterical, very nervous". She said she was "frightened" of

petitioner, "was all upset" and "couldn't talk". She then told the officer to "get him out of here"; "I don't want to see him, get him out of here". *She made no attempt to identify petitioner at that time. She did not say she could not identify him.*[2]

Petitioner was taken from her apartment by the officers who brought him there and Officer Mallder took Mrs. Barger to the Jackson Park Hospital where she was examined for about fifteen minutes by a doctor in an emergency room. While there her daughter and son-in-law arrived. Officer Mallder returned to the 10th District Station alone and Mrs. Barger was taken to this station by her daughter and son-in-law. This completed Officer Mallder's association with the occurrence.

Later that evening Officer Forberg saw petitioner coming out of the lockup. As petitioner passed him, petitioner said to him, "I did it, but you'll never prove it". When Mrs. Barger returned to the station with her daughter and son-in-law, a line-up of eight men, including petitioner, was taking place under the direction of police detectives. Four officers, a number of "victim" witnesses and others were present. Mrs. Barger viewed the line-up and immediately identified petitioner as "the man that robbed me and raped me". Her identification of petitioner was corroborated by two detectives, Kabor and McCarthy. Petitioner was dressed the same as earlier that evening.

The next morning Mrs. Barger was present at the Sex Bureau on the first floor in the Criminal Court Building

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2. Chief Judge Swygert's opinion refers to two showups during this short confrontation. The transcript shows that petitioner alone refers to two separate showups. The testimony of Mrs. Barger and Officer Mallder implies there was only one showup.

at 26th and California. Also present were Assistant State's Attorney Patrick Egan, Officer Forberg, Detective Prunkel and petitioner. Mrs. Barger testified that petitioner asked the Assistant State's Attorney if he could talk to her and was given permission to do so. Petitioner then said to Mrs. Barger, "You know, Ma'm I'm awfully sorry for what I did to you last night"; and "When I left the house, I didn't intend to do anything wrong". He further admitted he took the three singles and about $1.00 in change from her purse which she was then carrying. Officer Forberg corroborated Mrs. Barger, testifying that at that time petitioner said to her, "Miss, I am sorry for what I did. I know I caused you a lot of trouble. I can't face my family or my friends. I am trying to apologize but I am doing a bad job at it". Further, Officer Forberg quoted petitioner as saying, "I seen your purse and all I wanted was the money that was in your purse". Detective Prunkle corroborated Mrs. Barger, testifying that on that occasion petitioner said to her, "that he was sorry for what he done the night before, and he was ashamed of what disgrace he brought on his people, and that he was no good, and that he should be put away and he kept repeating it to the victim that he was very sorry for what he had done". Also, the witness testified, "She had a black purse", and petitioner identified the purse and told the Assistant State's Attorney Patrick Egan that "that was the purse he took the money out of".

Petitioner testified in his own defense. In substance, he denied all of incriminating statements attributed to him, he denied robbing and raping Mrs. Barger and he attempted to establish an alibi by three witnesses that he was not present at the time and place where the rob-

bery and rape occurred. He testified that he made no admissions at the Sex Bureau but stated that he did ask to speak to Mrs. Barger there for the purpose of telling her he was sorry for what happened to her the night before; that this was a serious charge against him and she was making a grave mistake and he wanted her to be sure of what she was saying; that he was only trying to get across to her that she was making a mistake.

Petitioner made several unsupported charges of police brutality, all of which were refuted and denied.

In rebuttal, two white women, Eleanor Westlake and Lilly Grafton, who lived about five blocks from the scene of the alleged crime and near where petitioner was arrested, testified in substance that shortly after the time of the alleged crime, they were accosted in the vestibule of their apartment building by a black man answering petitioner's description and dress. One of them positively identified petitioner at the police line-up as the person who accosted them in their apartment vestibule. At petitioner's trial in open court he was positively identified by Mrs. Barger, Officers Mallder, Forberg, Kobar, McCarthy and Prunkle, together with Eleanor Westlake and Lilly Grafton, as the person referred to in their testimony as petitioner Robert J. Raymond.

II

Petitioner was represented by counsel of his own choice from the time of his arraignment, through the trial, judgment and disposition of post-trial motions, judgments on the verdicts and sentencing. Following proceedings in the trial court, trial counsel was permitted to withdraw. Counsel for petitioner was appointed by the Supreme Court of Illinois and an appeal was filed in the Appellate

Court of Illinois. The judgment of the Criminal Court of Cook County, Illinois was in all respects affirmed on March 25, 1965, reported in abstract form only as *People* v. *Raymond*, 57 Ill. App. 2d 292, 206 N. E. 2d 740 (1965).

The opinion of the Appellate Court of Illinois was delivered by Presiding Justice McCormick, concurred in by Drucker, J., and English, J. This opinion appears in full as an exhibit in the proceedings in the federal district court below. The only ground raised in the Appellate Court in any way relevant to the appeal now before us is "that the State has failed to prove the defendant guilty of the crimes for which he was indicted, beyond a reasonable doubt". Mr. Justice McCormick engaged in a detailed statement and consideration of all the evidence much as we have hereinabove set out. He found that the "positive, clear and convincing evidence of the complaining witness would alone be sufficient to sustain defendant's conviction. ***(and that) when we consider the *positive identification* and the other strong evidence of the complaining witness and the police officers we can only conclude that there was ample evidence on the basis of which the jury could have found the defendant guilty beyond a reasonable doubt". (Emphasis added).

The Supreme Court of Illinois upheld the denial of post-conviction relief to defendant by the Circuit Court of Cook County, Illinois, after having appointed new and separate counsel for defendant on that appeal. *People* v. *Raymond*, 42 Ill. 2d 564, 248 N. E. 2d 663 (1969). At 42 Ill. 2d 568-569, the Supreme Court of Illinois gave express consideration to defendant's reliance upon *Stovall* v. *Denno*, 388 U. S. 293 (1967), as support for his contention "that his constitutional rights were violated when he was taken for identification to the victim's apartment

immediately after his arrest". Referring to Stovall, the Supreme Court of Illinois concluded, 42 Ill. 2d at 568: "Although the procedure followed by the police has been widely condemned, we find that after considering the totality of the circumstances of this case, defendant's constitutional rights were not violated". I agree with Chief Judge Swygert that the identification procedures followed in the initial showup in Mrs. Barger's apartment finds adequate support in *Stovall, supra.*

Although there is no showing that petitioner pursued his state court remedies by petition to the Supreme Court of the United States for certiorari, on June 2, 1970 (with still another court-appointed attorney), petitioner filed his instant habeas corpus petition in the United States District Court for the Northern District of Illinois, the Honorable Edwin A. Robson, Judge (now Chief Judge) presiding. In his habeas petition, *inter alia,* petitioner raised the two issues now before us on this appeal, viz: (1) that the pre-trial identification procedures prejudicially tarnished the in-court identification of petitioner by Mrs. Barger; and (2) that the prosecution suppressed evidence favorable to his defense. On October 6, 1970, the eminent district judge with the entire record and transcript of the state court proceedings before him, including the opinions of the Illinois Appellate and Supreme Courts, and after reviewing the evidence below agreed with the Supreme Court of Illinois that "the totality of circumstances surrounding petitioner's initial confrontation with the victim was not "so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law", citing *Stovall* v. *Denno,* 388 U.S. 293, at 301-302 (1967). Other habeas corpus claims were found to be frivolous on their face and not rising to constitutional dimensions.

Thus we find a division of three eminent justices of the Appellate Court of Illinois, a unanimous Illinois Supreme Court and a distinguished federal district court judge all in agreement that petitioner's federal constitutional rights were not prejudicially violated. I find myself to be in accord with them.

III

Chief Judge Swygert correctly recognizes that the standard to be applied in judging a due process claim involving pretrial identification procedures derives from *Stovall* v. *Denno*, 388 U. S. 293 (1967). He further recognizes that the Court in *Stovall* refused to give retroactive application to the rule announced in *United States* v. *Wade*, 388 U. S. 218 (1967) and in *Gilbert* v. *California*, 388 U. S. 263 (1967), requiring counsel at pretrial identification confrontations. He also properly recognizes that under *Stovall* 388 U. S. at 302, if the identification procedures were "so unnecessarily suggestive and conducive to irreparable mistaken identification that (the defendant) was denied due process of law" and that any particular claimed violation of due process must depend on the "totality of circumstances surrounding it".

With due deference, I part company with Chief Judge Swygert when he holds that the combination of the showup with the line-up "so undermined the reliability of the eye witness identification as to violate due process". He is not impressed with the showing that Mrs. Barger was hysterical and upset at the showup in her apartment to the extent that she could not or did not identify petitioner at that time. Neither is he impressed with Mrs. Barger's power of observation to have been able to identify petitioner while the two attacks were made on her.

In my considered judgment there is no adequate support in the record to justify the startling conclusion reached by Chief Judge Swygert on this issue. I cannot believe that for the first time in the long and tortuous court history of this criminal proceeding it can now be said, on the record below, that "the conduct of the pretrial identification procedure violated petitioner's constitutional rights and that the resultant evidence was inadmissible at trial".[3]

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3. If further analysis of the record be necessary, we quote with approval the summation by the Government in its brief on this appeal:

> "* * * in the present case, there are several critical factors negating the argument that the present identification procedures were 'so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification'. First of all, Virgie Barger had ample opportunity to observe the unmasked petitioner face-to-face in adequate lighting. Second, she had opportunity to clearly hear the petitioner speak. Third, there is no evidence that the emotional state of the witness was such as to preclude objective identification at the police lineup although, her emotional state did preclude and explain why Virgie Barger was unable to identify the petitioner in her apartment immediately after the crime and subsequent arrest. Fourth, the witness' observations of the petitioner were not so limited as to render them particularly amenable to suggestion or a tendency to identify on less than a positive basis. Fifth, the extra judicial identification confrontation occurred within approximately three (3) hours of the crime—assuring reliability. Sixth, there is no evidence that in the above mentioned confrontation the petitioner appeared with other male Negroes unreasonably dissimilar from himself. Seventh, there is no

Further, *under the record in this case* I do not find that *Foster* v. *California,* 394 U. S. 440 (1969), and other cases cited by Chief Judge Swygert, compel or even justify the holding of the majority. Rather, I find comfort in the rationale expressed by the author of the opinion in *Bates* v. *United States,* 405 F. 2d 1104, at 1106 (1968).[4]

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evidence that any tangible objects related to the offense were placed before the witness or the petitioner during identification to encourage selectivity. Eighth, there is no evidence of consultation, hesitation, or equivocation in the witness' identification. Ninth, there is no evidence that the witness made any identification of another person as the rapist-robber prior or subsequent to any identification confrontation with the petitioner. Tenth, the witness testified positively on direct and unshakenly on cross-examination concerning her ability to observe the petitioner during the crime. Eleventh, petitioner was able to take full advantage at trial of the witness' failure to identify him at the initial confrontation at her apartment".

4. In speaking for the court the then Circuit Judge Burger wrote:

> "There is no prohibition against a viewing of a suspect alone in what is called a 'one-man showup' when this occurs near the time of the alleged criminal act; such a course does not tend to bring about misidentification but rather tends under some circumstances to insure accuracy. * * *
>
> "Our review of the circumstances surrounding the apprehension of Appellant and the police conduct which led to his identification satisfies us that the claim that Appellant was denied due process of law is without merit; there was not 'substantial likelihood of irreparable *misidentification*'. To the contrary, the police action in returning the suspect to the vicinity of the crime for immediate identification in circum-

Just this week, on November 8, 1971, appears the publication of the opinion of the Sixth Circuit in *Hancock* v. *Tallett,* 447 F. 2d 1323 (1971), where, in an extended review of *Stovall* in another pre-*Wade* case, the court finds no denial of due process notwithstanding a showup where the witnesses had had a good opportunity to view the robbers in a well-lighted area, followed by another confrontation at the jail some eight to ten days later.

Finally, if there be thought that a *per se* rule on findings of due process flows from *Stovall,* that thought has been laid to rest following the dissenting opinion of Mr. Justice Douglas in *Biggers* v. *Tennessee,* 390 U. S. 404, at 408 (1968), and referred to in *Bates, supra,* 405 F. 2d at 1106, fn. 3, and a host of other federal and state decisions.

Hence, it becomes obvious that on the mistaken identification issue I have read the record evidence differently than Chief Judge Swygert.

IV

The second issue on this appeal concerns petitioner's contention that his constitutional right to due process was violated when the State did not introduce into evidence a police crime laboratory report of a microanalysis performed on petitioner's clothing showing a negative result.

The record discloses that petitioner gave his clothing to the police for testing, willingly and with his consent;

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stances such as these fosters the desirable objectives of fresh, accurate identification which in some instances may lead to the immediate release of an innocent suspect and at the same time enable the police to resume the search for the fleeing culprit while the trail is fresh".

he was told the results of the test the next day and knew then they were negative; he apparently did not tell his attorney about the test or results thereof; and he waited until after he had been found guilty and his motion for a new trial was coming up for hearing to request a copy of the report. The State promptly made it a part of the record in compliance with petitioner's request.

The majority recognizes that this is a case of first impression. The key question is whether the State, having immediately made known the results of the police laboratory tests to petitioner had a continuing constitutional duty to disclose the information to petitioner's attorney. The majority extends the rule of *Brady* v. *Maryland,* 373 U. S. 83 (1963) and places the facts of the instant case under its umbrella. In doing so, I respectfully submit that the majority erred.

In *Brady,* the court said: "We now hold that the *suppression* by the prosecution of evidence favorable to an accused *upon request* violates due process where the evidence is material either to the guilt or to punishment, irrespective of the good faith or bad faith of the prosecution". 373 U. S. at 87. (Emphasis added).

Here is it clear that petitioner had full knowledge of the facts and this could hardly be called "suppression". Neither petitioner nor his attorney "requested" the evidence before or during the trial, although petitioner had full knowledge of its existence and content.

Finding that the evidence in question was *not exculpatory,* that petitioner knew of the report and was informed of the results of the analysis, yet he did not apprise his attorney of these facts, and waited until after he had been found guilty to exhibit any interest in its procurement,

the Supreme Court of Illinois held that no deprivation of due process had been shown. *People* v. *Raymond,* 42 Ill. 2d at 568. I agree.

Further, no case has been cited since *Brady,* and we know of none, wherein a court has found that evidence has been suppressed in violation of *Brady* when either the defendant or his attorney had knowledge of the evidence. Cases contrary to petitioner's contention and the majority holding are *Hayes* v. *Wainwright,* N. D. Fla., 302 F. Supp. 716, 718 (1969) and *Pugliano* v. *Staziak,* W. D. Pa., 231 F. Supp. 347, 354, fn. 10 (1964).

On this issue I would hold that there was no suppression of evidence in violation of *Brady.*

In sum, I would affirm the judgment of the district court.

PELL, *Circuit Judge,* dissenting in part and concurring in part. The opinions prepared by my brothers of the panel are persuasively put and each contains a painstakingly careful analysis of the pertinent issues. Nevertheless, and regretfully, I am unable to concur in toto with either.

Upon the basis of the factual situation presented by the record, I find no violation of Raymond's constitutional rights in the conduct of the pretrial identification procedure. Hence, I concur in the opinion of Senior Judge Hastings that the petition for a writ of habeas corpus was properly denied insofar as the identification procedure is concerned.

However, although the question may well be a close one, I must concur with Chief Judge Swygert that the

State did not discharge its duty to disclose evidence to the defendant.

I reach this conclusion somewhat reluctantly in view of the clear exposition in Judge Hastings' opinion of the facts showing Raymond's guilt of a crime which cannot be typified other than as heinous. My reluctance does not flow from any premise that where guilt is reasonably clear we should overlook or minimize constitutional violations having a substantial likelihood of contributing to the conviction. However, every judge cannot but be painfully aware that substantial segments of the citizenry are critical of judicial decisions the effect of which might be to release an apparently guilty criminal before he has served his debt to society because of the inherent difficulties attendant upon a retrial many years after the incident in question. None of us willingly wants to participate in a decision which might cause the public to have less than high regard for our system of judicial administration.

Yet this is a risk which must be assumed if the great immunity of every person from deprivation of life, liberty, or property without due process of law is to be something more than glowing phrases to be mouthed hollowly from flag bedecked platforms.

In that context, I turn to the issue before us. There seems to be no disagreement as to the facts and very litle, if any, disagreement as to the basic law.

As to the facts, Raymond was aware that the laboratory test had been made and the negative results of it. This was not based upon police testimony that he was told but by his own admission (which I regard as refreshingly candid considering its cruciality) that he was told by the commander at the police station, "The re-

sults of the test on your clothing came back and proved negative, but this don't (sic) clear you".

It is further undisputed that Raymond's counsel was not aware of the lab test or its results until after the trial and conviction.

No reason appears in the record for the defendant's failure to inform his attorney about the test although it is difficult to conceive why he would not have done so since it appears to have been about the only thing "going" for him at the time.

The petition states that Raymond thought the State would, as a part of its duty to protect all concerned, the accused as well as the accuser, introduce the results of the test in evidence. While a criminal trial should, for the purpose of establishing guilt or innocence, bring forth all of the pertinent facts and not be a game of skill, I know of no authority which would require the State itself to put the test results into evidence.

Perhaps more crucial as to the reason for the failure of communication is the allegation of the petition that the matter had not been mentioned in the *two* interviews between attorney and client in the *eight* months of incarceration.

As to the law, the panel is in agreement that the suppression by the prosecution of evidence favorable to an accused upon request by the accused violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. *Brady* v. *Maryland,* 373 U.S. 83, 87 (1963).

Of course, there was no request but counsel apparently was not clairvoyant and Raymond individually had not

reached the stage of some present-day defendants of trying his own case. In any event, post-*Brady* authority indictates the request is not necessarily crucial and with this I would agree. *Barbee* v. *Warden, Maryland Penitentiary,* 331 F. 2d 842 (4th Cir. 1964).

Disagreement in the panel, however, is centered on the question of whether it is sufficient that the accused alone be aware of the evidence. I join Chief Judge Swygert in holding that it is not.

From the cornerstone of *Powell* v. *Alabama,* 287 U. S. 45 (1932), we now have firmly fixed the concept of the right of the State-accused defendant to counsel under the 14th Amendment.

> "The right to counsel at the trial (*Gideon* v. *Wainwright,* 372 U. S. 335); on appeal (*Douglas* v. *California,* 372 U. S. 353); and at the other 'critical' stages of the criminal proceedings (*Hamilton* v. *Alabama, supra*) (368 U. S. 52 (1961)) have all been retroactive since the 'denial of the right must almost invariably deny a fair trial'. See *Stovall* v. *Denno,* 388 U. S. 293, 297". *Arsenault* v. *Massachusetts,* 393 U. S. 5, 6 (1968). (Footnote omitted).

Returning to *Powell, supra,* I note the basic tenet that the duty of assigning counsel "is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case". 287 U. S. at 71.

It seems patent to me that the suppression of material evidence from the counsel is to preclude the giving of effective aid, the very purpose of having counsel.

Returning to the evidence, while the Supreme Court of Illinois states in *People* v. *Raymond,* 42 Ill. 2d 564, 568 (1969), the evidence was not *necessarily* exculpatory, it clearly in my opinion *was* exculpatory.

It should not take particularly skilled counsel, given the prosecuting witness' description of the time, manner and extent of the rape, to argue most effectively that if he had been the culprit the indicia of the ill deed most certainly would have been on his clothing. Because the State did not make the information available, the jury was unaware of what, with an alibi, might well have been crucial evidence. I cannot conceive that the absence of the evidence since it stemmed from suppression permitted a fair trial.

The result of the jury's verdict might have been the same with the evidence before it but for us to say so could only be on a basis of speculation. Suffice it to say, I cannot assert in the setting of this particular case, notwithstanding the incriminating evidence, the constitutional error was so unimportant or insignificant that it could be deemed harmless. In other words, I am unable to declare belief that it was harmless beyond a reasonable doubt. *Chapman* v. *California*, 386 U.S. 18, 22, 24 (1967).

I am aware that the decision on this point seems to amount to a per se rule but it appears to me to be a healthy rule that the elimination of suppression of material evidence should take the form of communication to the attorney for it is he who will make the determination of what to present and what not to present to the trier of fact in the guilt determination process. It is he who has the expertise for evaluation of what may be helpful or hurtful to his client's cause.

The establishment of a per se rule will eliminate the temptation to law enforcement officials to communicate only with the accused with the thought that he may not tell his attorney because of insufficient contact with him, lack of appreciation of the true significance of the communicated data or just pure inadvertence. In such event, the task of conviction is, of course, simplified.

It is not necessary, in my opinion, to determine whether every instance of suppression will constitute harmful error. We are concerned only with the factual situation of this case where the suppression could have been harmful. The great writ, in my opinion, should have been granted on this issue with appropriate opportunity afforded to the State for the retrial of the defendant.

A true Copy:

Teste: .....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604
Monday, January 24, 1972
Before

Hon. LUTHER M. SWYGERT, Chief Judge
Hon. JOHN S. HASTINGS, Senior Circuit Judge
Hon. WILBUR F. PELL, JR., Circuit Judge

UNITED STATES OF AMERICA ex rel., ROBERT J. RAYMOND, Petitioner-Appellant,	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 71-1330	
PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee.	

IT IS ORDERED by the court that the petition for rehearing filed in this appeal be, and the same is hereby, denied.

(Senior Judge Hastings voted to grant said petition for rehearing.)

COPY PRINTED CLOSE TO EDGE

APPENDIX C

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604
Monday, January 24, 1972

Before

Hon. LUTHER M. SWYGERT, Chief Judge
Hon. ROGER J. KILEY, Circuit Judge
Hon. THOMAS E. FAIRCHILD, Circuit Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. WILLBUR F. PELL, JR., Circuit Judge
Hon. JOHN PAUL STEVENS, Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge

UNITED STATES OF AMERICA ex rel., ROBERT J. RAYMOND, Petitioner-Appellant, No. 71-1330 PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

On consideration of the petition for rehearing or rehearing *en banc* filed in the above-entitled cause, a vote of the active members of the court was requested, and a majority of the active members having voted to deny a rehearing *en banc*,

IT IS ORDERED that the petition for rehearing *en banc* be and the same is hereby denied.